

MINUTES

**MONTANA SENATE
59th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN MIKE WHEAT**, on April 6, 2005 at 9:05 A.M., in Room 137 Capitol.

ROLL CALL

Members Present:

Sen. Mike Wheat, Chairman (D)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jon Ellingson (D)
Sen. Jesse Laslovich (D)
Sen. Dan McGee (R)
Sen. Lynda Moss (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Jim Shockley (R)

Members Excused: Sen. Jeff Mangan (D)

Members Absent: None.

Staff Present: Valencia Lane, Legislative Branch
Mari Prewett, Committee Secretary

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: HB 22, HB 782
Executive Action: HB 22

CHAIRMAN MICHAEL WHEAT, SD 32, BOZEMAN opened the hearing on HB 22.

HEARING ON HB 22

Opening Statement by Sponsor:

REP. WALTER MCNUTT (R), HD 37, opened the hearing on **HB 22,** Funding for water adjudication.

REP. MCNUTT informed the Committee that HB 22 was the result of HJR 4 from the previous session and a study by the Environmental Quality Council (EQC) during the interim. He expressed that, at the rate water adjudication rights are being decided, it would take another 40 years before they were all dealt with. In his opinion, water is going to become the gold of the 21st century. He thought that it would be dangerous if Montana put off the issue of water adjudication much longer. He claimed that the purpose of HB 22 was to generate a funding source for the adjudication program. It would also set procedures for claims examination. The goal is to get decrees on all of the basins in the state. He indicated that the bill set the timeframe at 15 years, 10 years for the Department of Natural Resources and Conservation (DNRC) to do their claims examination and an additional five years for the Water Court to get some form of a decree issued on all of the basins. He reported that there were about 57,000 claims to be reviewed and examined out of the 220,000 that were filed with DNRC. The bill also contained benchmarks for DNRC such as the number of claims that have to be examined per year.

He explained that Section 5 of the bill was a fee schedule for the DNRC. He provided a matrix for the fee schedule. The amount of the fee was determined by calculations made by DNRC and the Water Court, as to the amount of money that they will need to finish the process in the timeframe that the interim committee set forth. He noted that the fee would be capped at \$31 million and would terminate on June 30, 2014, or sooner. He indicated that part of the fee which they would not assess is federal water rights, tribal reserved and aboriginal rights. They requested that the federal government help participate in the funding. If the federal government came forth with any money, the fee would be capped sooner. He informed the Committee that the fee would be billed by the Department of Revenue and that it would be up to DNRC to follow through with the billing.

EXHIBIT(jus99a01)

REP. MCNUTT mentioned that they had also addressed the reexamination of basins which did have decrees. The legal council informed the interim committee that they had no legal basis to reexamine irrigation claims. Thus, there is a petition process where, if 15% of the inhabitants of the basin request the Water Court to do an examination, DNRC can examine the basin. He expressed that, in order to see that progress is being made with the adjudication, he wanted the allocation to come from HB 2. In closing, he talked about the expenses associated with adjudication. He also discussed some of the provisions associated with the bill and the fees attached. He reserved the right to close.

{Tape: 1; Side: A; Approx. Time Counter: 0 - 14}

Proponents' Testimony:

Barbara Broberg, Representing Montana Women Involved in Farm Economics, stood in support of HB 22.

{Tape: 1; Side: A; Approx. Time Counter: 14 - 14.4}

SEN. ROBERT STORY, SD 30, PARK CITY, served on the EQC. He asserted that water adjudication is very complicated. He thought that it was important that the process be completed. He felt that Montana has to have adjudication in order to protect the state from claims downstream.

{Tape: 1; Side: A; Approx. Time Counter: 14.4 - 16.8}

Mike Murphy, Representing the Montana Water Resource Association, provided strong support of HB 22. He extended appreciation to the members of EQC and others who made this bill work. He restated that it would be another 40 years before the adjudication was finished if things continue as they have been.

{Tape: 1; Side: A; Approx. Time Counter: 16.8 - 18.2}

John Youngberg, Representing Montana Farm Bureau, indicated that while there had been some controversy, the Bureau's members felt that ultimately it was better to get adjudication done. He mentioned that one of the most important aspects of the bill for the members was the benchmarks. He offered support on HB 22.

{Tape: 1; Side: A; Approx. Time Counter: 18.2 - 18.9}

John Bloomquist, an Attorney Representing Montana Stockgrowers Association, stood in support of the bill. He noted that the funding for the task was debated and criticized. He pointed out

that the people who know how water rights have been historically used will disappear if the issue is extended much longer. He felt that one of the key issues in getting the adjudication done in a timely fashion was the preservation of evidence and the ability to have that evidence available when the Water Court is available to determine the historic use of the rights. He attested that the water users were willing to take on the fee to get the process finished. He endorsed HB 22.

{Tape: 1; Side: A; Approx. Time Counter: 18.9 - 22.7}

Chris Christiaens, Representing Montana Farmers' Union, thought that it was critical that the process move forward in an expeditious manner because of the potential loss of the historic memory of individuals who have been involved with the adjudication process. His organization was also very skeptical of the process but are willing to do whatever it takes in order to complete the process because they feel that it is so important.

{Tape: 1; Side: A; Approx. Time Counter: 22.7 - 23.6}

Mary Sexton, Director of DNRC, provided a written testimony for the Committee. She provided a brief background of the DNRC's role with water adjudication in Montana. She compared Montana's process in dealing with water adjudication to Idaho's process. She thought that the money and the effort will be equivalent for the two states. She strongly urged the Committee to support HB 22.

EXHIBIT(jus99a02)

{Tape: 1; Side: A; Approx. Time Counter: 23.6 - 26.9}

Steve Snezek, Representing the Montana Association of Realtors and the Montana Grain Growers Association, supported HB 22 for all of the reasons mentioned by those before him. Both organizations stood in strong support of the benchmark provisions.

{Tape: 1; Side: A; Approx. Time Counter: 26.9 - 27.5}

Chris Ahner, Representing 900 Members of the Northwest Montana Association of Realtors, handed out a written version of her testimony.

EXHIBIT(jus99a03)

{Tape: 1; Side: B; Approx. Time Counter: 0 - 0.2}

Tom Ebzery, an Attorney Representing Avista Corp and Pacific Corp, stood in support of HB 22. He expressed that the Corp thought that this might be one of the most significant pieces of legislation this session. He talked about the interim committee and the group of people who came forth with the solution presented in HB 22. He discussed the flat rate process which was the process by which fees could be collected. He called the Committee's attention to Page 13 of the bill.

{Tape: 1; Side: B; Approx. Time Counter: 0.2 - 4.2}

Bob Lane, Chief Legal Counsel for the Department of Fish, Wildlife, and Parks, expressed support and appreciation for those who worked on the bill. He recognized that there were a few problems that were wrong with adjudication such as the time it would take and accuracy. He remarked that the interim committee was able to divide the allocation fairly among all of the water users. He provided the Committee with a written copy of his testimony.

EXHIBIT(jus99a04)

{Tape: 1; Side: B; Approx. Time Counter: 4.2 - 6.7}

Harold Blattie, Representing the Montana Association of Counties, noted that the membership had adopted a resolution in support of funding for water adjudication. He urged the support of the Committee for HB 22. On a personal note, he provided support for the bill as well.

{Tape: 1; Side: B; Approx. Time Counter: 6.7 - 7.9}

Don Allen, Representing Western Environmental Trade Association (WETA), seconded the comments made by Mr. Ebzery concerning keeping the bill intact and with the appropriation. They stood in support of HB 22.

{Tape: 1; Side: B; Approx. Time Counter: 7.9 - 9}

Mark Aagenes, Representing Montana Trout Unlimited, agreed with **REP. MCNUTT** and the other proponents that it was the right time to deal with water adjudication. He mentioned that they would put forth money from fishing license fees because it was so critical to Montana's rivers.

{Tape: 1; Side: B; Approx. Time Counter: 9 - 9.7}

Jay Hendrix, Water User from Flint Creek Valley, cautiously supported HB 22. He expressed some concerns as to the ending.

He remarked that they wanted to see the benchmarks kept in place. He mentioned that the water users were the people at the end who were affected greatly. He felt that they should contribute but were worried that they were being taxed for nothing. He gave a written version of his testimony and a petition from other water users to the Committee.

EXHIBIT(jus99a05)

{Tape: 1; Side: B; Approx. Time Counter: 9.7 - 11.8}

Opponents' Testimony:

Tracy Turek, a Water Rights Consultant from Stevensville Montana, agreed with the ideology of the bill. However, she was opposed to the methodology of raising the funds. She felt that there were a lot of questions that needed to be answered about how the money was going to be raised and utilized. She thought that the DNRC did not have the right focus nor did she feel that they utilized their employees correctly. She felt that the new appropriations work load would be dramatically reduced. She posed two questions to the Committee: 1) "What are the 26 employees going to be doing? And do we need to raise fees and taxes on people for an agency that has currently trained employees that are proficient in water rights, water resources who know how to examine a water rights claim?" 2) "How is this money going to be collected?" It was her understanding that the DNRC database ownership records were going to be used. She did not think that this would be the most accurate database in the state. She reiterated that she believes water adjudication needs to be done but does not believe that taxing people in this manner would produce the needed results. She was also concerned that only one person out of a multi-owned water right would be paying the bill. She mentioned some other problems she had with the bill. She asked the Committee to think about the problems that were inherent in the bill and in the DNRC's database.

{Tape: 1; Side: B; Approx. Time Counter: 11.8 - 19.5}

Informational Testimony:

Bruce Loble, Chief Water Judge for the Montana Water Court, offered to answer any questions from the Committee.

{Tape: 1; Side: B; Approx. Time Counter: 19.5 - 20}

Questions from Committee Members and Responses:

SEN. BRENT CROMLEY, SD 25, BILLINGS, asked what the possibilities were for the Federal Revenue Appropriations referred to in Section 7 of the bill.

REP. MCNUTT responded that there was a possibility because there had been a request sent by DNRC for assistance. To this point, he noted that the federal government had not contributed anything to water adjudication. He would not say for sure that they would be receiving any assistance but they wanted to add the language just in case.

{Tape: 1; Side: B; Approx. Time Counter: 20 - 21.4}

SEN. DANIEL MCGEE, SD 29, LAUREL, requested that Mr. Stults address current staff levels and the focus of their work. He also asked him if the bill would give the Division the authorization they might need to have contract services as opposed to employees.

Jack Stults, Division Administrator for Water Resources Division, affirmed that the current staffing was primarily focused on the new appropriations program with only nine employees working on the adjudication. He mentioned that they had adopted rules which they hoped would streamline the process. They found that getting new water rights was still a critical element of economic development. He asserted that many questions were looked at through the EQC process. The possibility of reallocating resources was a specific issue addressed by **REP. BARRETT** and the conclusion was made that it would be too speculative to move in that direction.

SEN. MCGEE followed up by asking if HB 22 would allow for outside resources.

Mr. Stults replied that there would be issues because it would be the first time they were going to place an annual fee on water rights. He reiterated that the fees would be limited to this project alone and only for the length of the project. He informed the Committee that the majority of the work would be done by permanent state employees. They have found that it is typically slower and more costly to use contracted services for routine processes. He noted that there were some special functions which they anticipated using contracted services for and they already had the funds allocated in HB 2 in order to do that. He informed the Committee that one of these services would be the determination of the accuracy of the addresses and names of the current owners in the database. He asserted that there

were many things that needed to be anticipated but felt that they were doing a good job so far. He guaranteed the Committee that they were committed to meeting the benchmarks.

{Tape: 2; Side: A; Approx. Time Counter: 0 - 2}

Closing by Sponsor:

REP. MCNUTT commented on the accusation that DNRC curtailed their effort. He stated that DNRC did not do so because they wanted to, but because they had their funding cut for the adjudication program. He also asserted that DNRC did not allow exempt water rights, it was the legislature which placed them in the statutes. He reiterated that there was a lot of work, a lot of hours, conversations, and dialogues which went into the creation of HB 22. He felt that it covered everyone in the state. He urged that the Committee concur with the bill.

{Tape: 2; Side: A; Approx. Time Counter: 2 - 4}

CHAIRMAN WHEAT closed the hearing on HB 22 and opened the hearing on HB 782.

HEARING ON HB 782

Opening Statement by Sponsor:

REP. WALTER MCNUTT (R), HD 37, opened the hearing on **HB 782**, Require issue remarks to be resolved before issuing final decree.

REP. MCNUTT advised that HB 782 was the last piece of the tool which they needed to finish the adjudication process. He reported that the bill was the result of information learned by the EQC interim study on the Water Adjudication Program. The bill was designed to handle issue remarks. He submitted to the Committee that it would not bode well if all of the basins were adjudicated and there were issue remarks which could be upheld in court. The bill would handle these critical issues, get the results of statewide adjudication, handle the issue remarks, and assist in speeding up the process. He informed the Committee that the method used would be in conjunction with the Water Court. The bill allows the Attorney General to intervene when needed and try to resolve the issues. He thought that it would help with the accuracy. He reserved the right to close.

{Tape: 2; Side: A; Approx. Time Counter: 4 - 8.5}

Proponents' Testimony:

Tim Hall, Chief Legal Counsel for DNRC, urged the Committee's strong support for HB 782. He indicated that HB 22 along with HB 782 were the most important water rights legislation over the past 25 years. He claimed that HB 782 would provide reasonable accuracy for the adjudication. This will be important to defend the adjudication from attacks and also to make decrees accurate useful tools for distributing water. He expressed that issue remarks need to be resolved before a water right is adjudicated and placed in a final decree. He reported that to date the State has spent \$39 million on adjudication. He felt that the important aspect of HB 782 was that everyone would be treated equally, no matter when the decree was released. He noted that each water user would have the opportunity to address the issue remark either with the DNRC or through the Water Court. He remarked that through HB 782 the legislature would be mandating that issue remarks must be cleared up before final decrees are issued. This bill would end the 25-year debate over Montana's adjudication accuracy. Under this process, he felt that objections to water rights would still be very important. He did not see any need for amendments. He urged do pass on HB 782.

{Tape: 2; Side: A; Approx. Time Counter: 8.5 - 12.7}

John Youngberg, Montana Farm Bureau, spoke in support of the bill. However, he asked the Committee to consider some amendments to the bill.

{Tape: 2; Side: A; Approx. Time Counter: 12.7 - 13.6}

Mike Murphy, Montana Water Resources Association, also felt that there needed to be some amendments that needed to be addressed. They supported the legislation with the amendments.

{Tape: 2; Side: A; Approx. Time Counter: 13.6 - 14.6}

Pam Bucy, Assistant Attorney General Representing the Attorney General's Office, indicated that the Attorney General's Office supported HB 782 because it would provide a solution to a long recognized problem with the state's water adjudication process. She felt that it would provide certainty for claimants of water rights and accuracy for enforcement of decrees. She expressed that the bill provided fair and structured process for the Water Court with the assistance of the water resource staff and the Montana Supreme Court Claims Examination Rules. It provided the certainty that all issue remarks raised in examination would be fully resolved. She remarked that the Attorney General accepts the responsibility directed to him under the bill and urged the

Committee's strong support to preserve and protect the existing rights to the beneficial use of water in Montana.

{Tape: 2; Side: A; Approx. Time Counter: 14.6 - 15.7}

Holly Franz, Representing PPL Montana, Testifying on Behalf of the Clark Fork Taskforce, felt that HB 782 would implement their recommendation based on a legal mandate to protect existing water rights while allowing for additional development.

{Tape: 2; Side: A; Approx. Time Counter: 15.7 - 16.7}

Mark Aagenes, Montana Trout Unlimited, encouraged the adoption of the bill as written.

{Tape: 2; Side: A; Approx. Time Counter: 16.7 - 17.2}

Bob Lang, Chief Legal Counsel for the Department of Fish, Wildlife, and Parks, supported HB 782 as a companion to HB 22. He felt that it was the process by which the assurance would be given that HB 22's money would be put to good use and would result in an adjudication. He handed out a written version of his testimony. He discussed the unresolved issue remarks and what they mean to adjudication. He explained that an issue remark was something that was determined by DNRC, after a claims examination, with rules adopted by the Supreme Court, to be a problem with a particular claim. He wanted it to be made clear that the issue remarks were significant enough to be looked at and dealt with in the process. He added that the amendments fell within two categories: 1) editing efforts and 2) amendments that would change the focus of the bill. He expressed that Fish, Wildlife, and Parks was opposed to the amendments.

EXHIBIT(jus99a06)

{Tape: 2; Side: A; Approx. Time Counter: 17.2 - 21.9}

Chris Christiaens, Montana Farmer's Union, rose in support of the bill. He asked that the Committee support the amendments. They believe that accuracy is essential to the process particularly with the amount of funds that are going to be allocated to the process.

{Tape: 2; Side: A; Approx. Time Counter: 21.9 - 22.6}

Faye Bergem, Representing the Reserved Water Rights Compact Commission, provided a written testimony to the Committee. She expressed that Montana's continued jurisdiction over Indian and federal water rights is dependent on the adequacy of the

adjudication as applied. She urged the Committee to support the bill.

EXHIBIT(jus99a07)

{Tape: 2; Side: A; Approx. Time Counter: 22.6 - 23.3}

Chris Ahner, Representing the Northwest Montana Association of Realtors, urged the favorable consideration of the bill. She reminded the Committee that Montana's lakes, streams, and water basins do not stop at the borders.

{Tape: 2; Side: A; Approx. Time Counter: 23.3 - 24}

Opponents' Testimony:

John Bloomquist, Montana Stockgrowers Association, expressed that the bill was important. He noted that accuracy and issue remarks have been discussed since water rights were developed. He felt that issue remarks are variably significant depending on who is discussing them. He explained that issue remarks are frequently used as objections to water right claims. He stated that issue remarks are not infallible and, if accuracy was going to be a major issue, then the accuracy of issue remarks should be addressed. He talked about a few provisions of the bill which were beneficial.

Mr. Bloomquist distributed amendments to the bill. He mentioned that he had shared the amendments with the Water Court and the Attorney General's Office. He felt that the amendments would make the bill clear and right so that there were no unintended consequences. He proceeded to discuss all seven of the amendments he wanted for the bill. He indicated that adjudication would not be 100% accurate. He urged the Committee to try and avoid placing language in the statute which would acknowledge inaccuracy. The last amendment he addressed dealt with the definition of issue remark. He expressed that issue remark meant "a statement added to a claim record by the Department or the Water Court to identify a particular factual and legal issue." He clarified that an issue remark was not in the claim record rather a remark attached to the abstract of the water right as it appears in a decree issued by the court. He asked the Committee to adopt the amendments to make the bill more accurate.

EXHIBIT(jus99a08)

{Tape: 2; Side: B; Approx. Time Counter: 0 - 8.5}

CHAIRMAN WHEAT asked Mr. Bloomquist if he would still be an opponent to the bill if the Committee accepted the amendments.

Mr. Bloomquist replied that if the amendments were adopted his organization would be in support of the bill.

{Tape: 2; Side: B; Approx. Time Counter: 8.5 - 8.8}

Mike Cusick, an Attorney Specializing in Water Rights and Water Rights Adjudication and Member of the Water Adjudication Advisory Committee, wanted to go on the record as opposed to HB 782 with the exception of Section 9, the appropriation for the Attorney General to participate as an intervener in the process. He felt that HB 782 was unnecessary, would slow the speed of the adjudication, and would not promote accuracy in the way the proponents believed that it would. He expressed that the bill was unnecessary because the Water Court had already submitted proposed water adjudication rules to the Supreme Court. He thought that the provisions of the bill were the same as the proposed rules that the Water Court had put forth with one exception; that the bill would make the review of every issue remark mandatory by the Water Court. He claimed that the bill would strip the Water Court of all its discretion to determine what issues were significant enough to merit its attention. He submitted that the bill would slow down adjudication by adding in the administrative process.

He attested that the bill had several problems. The first one, and the most important in his opinion, was that it would slow down the process. He thought that when there is no actual dispute in front of the Court they will not be able to make an accurate resolution. He felt that the court would become the prosecutor and the judge of water rights in these instances. Another problem he saw with the bill was that by mandating that the Water Court resolve all of these issues, the water users will rely on the Water Court to resolve these issues for them. He saw this compounding the problem of not having adverse parties in front of the Court.

Mr. Cusick felt that the proponents put forth a similar proposal to the Water Adjudication Advisory Committee and it was eventually rejected in favor of the Water Court developing its own rules. He asserted that the bill was really about the State agencies, who are proponents of the bill, looking to the Water Court to do their job for them. He reiterated that he would support Section 9 of the bill and suggested that it provide more money to the Office and install DNRC as an institutional objector. He restated that he was opposed to the bill because it was unnecessary, would duplicate the proposed rules set forth by

the Water Court, and would burden the Court with unnecessary issues that none of the other water users or parties in the decree would feel merit any attention.

{Tape: 2; Side: B; Approx. Time Counter: 8.8 - 23}

SEN. LASLOVICH left the hearing at 10:47 A.M.

Russ McElyea, Water Lawyer, stood in opposition to the bill. He agreed that accuracy has been discussed for many years but disagreed that the bill was the appropriate vehicle for addressing that concern. He thought the bill had been assembled without adequate input from a large constituency. He took issue with some of the purported benefits of the bill. He did not perceive that it would obviate potential challenges to the adjudication process in the future. He thought that it would contribute to the validity of those challenges by providing a potential challenger with the two arguments: 1) the language that is in the bill creates an open door for an opponent to argue that if the Attorney General intervenes, it is evidence of a defect in the process, and 2) that at present each participant in the adjudication process has a clear chance and an opportunity to be heard. He provided an example of how the process was currently working. He thought that HB 22 was a large step forward for improving the adjudication process. He expressed that the bill would change the precedence that had been established with the prima facia status of claims. He thought that the bill would change this status, making the claimant guilty until proven innocent. He also thought that it would give tremendous power to the DNRC staff to set the agenda for the Water Court. In addition, he thought that the bill was turning the Water Court into prosecutor and judge, asking that they be neutral yet oppositional as well.

He felt that there were better ways to address the accuracy issue than the bill. He agreed with some of Mr. Bloomquist's suggestions, feeling that they were useful and helpful suggestions which would make the bill better. He suggested that if the Committee wanted to make the process more accurate they should fund an institutional objector or authorize the Attorney General to intervene as a matter of right on any water rights case it sees fit to intervene on. He would not compel the Water Court to have a hearing on every issue. He urged the Committee to approve the amendments which Mr. Bloomquist suggested if they were going to pass the bill.

{Tape: 3; Side: A; Approx. Time Counter: 0 - 2.5}

Informational Testimony:

Judge Loble was present to answer any questions the Committee had.

Questions from Committee Members and Responses:

SEN. CROMLEY wondered what a "gray area remark" is and if they had thought of giving a definition for it in the bill.

REP. MCNUTT replied that he did not know what it was.

Mr. Hall responded that gray area remark comes from the 1980's verification procedures. He explained that it was just an earlier form of an issue remark on water rights.

SEN. CROMLEY inferred this to mean that it was exactly the same thing as an issue remark.

Mr. Hall clarified that it was not exactly the same but an earlier version of the types of remarks that were put on during verification of water rights claims before the Supreme Court Water Rights Claim Examination Rules came out in 1987. He asserted that they were issues placed on water rights during the examination of the rights.

SEN. CROMLEY asked if the term was referred to in the Supreme Court rules.

Mr. Hall did not know.

{Tape: 3; Side: A; Approx. Time Counter: 2.5 - 5.1}

SEN. MCGEE requested that **REP. MCNUTT** tell the Committee how he felt about the proposed amendments.

REP. MCNUTT expressed that he did not have objections to the amendments after having looked at them. He agreed that they did not need something that would open the door to an automatic challenge.

{Tape: 3; Side: A; Approx. Time Counter: 5.1 - 6}

CHAIRMAN WHEAT understood that when the bill was being drafted the Attorney General was given the right to intervene so that the Office could act as an objector on the part of the State because the State owns the water. He wanted to know if Ms. Bucy understood it that way as well.

Ms. Bucy affirmed **CHAIRMAN WHEAT'S** statement. She informed the Committee that she was at the hearing on behalf of Candice West who was out of town. She indicated that water rights was not her area of expertise.

CHAIRMAN WHEAT referred to amendment 2 proposed by Mr. Bloomquist. He wanted to know why Mr. Bloomquist was opposed to having the Attorney General intervene to resolve the issue remarks.

Mr. Bloomquist responded that he did not think that his amendment would remove the Attorney General from that opportunity. He clarified that his amendment would put a period on Line 24 after "right."

CHAIRMAN WHEAT asserted that he knew what the amendment said. He attested that, if the language was kept in, the bill would say that the Attorney General could intervene as a matter of right to finally resolve any issue remark that is determined to affect the accuracy or enforcement of the decree. He understood that they did not want to institutionalize a challenge but he felt that they were taking out the ability for the Court to be neutral.

Mr. Bloomquist thought that the proposed amendment would still allow, and authorize statutorily, the Attorney General to intervene on any issue remark that has been unresolved. He explained that Mr. McElyea was suggesting that the Attorney General should be allowed to intervene in the process. He mentioned that the bill was not needed to allow this to happen.

CHAIRMAN WHEAT asked, if the Committee adopted the second amendment, wouldn't the Attorney General be able to adopt the rules whereby they identify all issue remarks that they need to intervene on.

Mr. Bloomquist assumed that if they were adopting rules to implement their participation in the adjudication process and dealing with issue remarks they would put some sort of construct on it.

{Tape: 3; Side: A; Approx. Time Counter: 6 - 11.2}

CHAIRMAN WHEAT understood Mr. Hall's reluctance to make any changes. He asked Mr. Hall if he thought that if Mr. Bloomquist's amendments were adopted that the Attorney General's Office would, in the rulemaking process, determine which issue remarks would warrant their intervention.

Mr. Hall agreed that they probably would.

CHAIRMAN WHEAT followed up, asking that, assuming the Attorney General were to adopt rules that would outline precisely the type of issue remark they would intervene on, wouldn't the amendment be okay.

Mr. Hall asserted that he did not think that it would be and he would still be opposed to the amendment.

CHAIRMAN WHEAT cited Page 3, Subsection 9, proposed Subsection D. He asked Mr. Hall if he had a problem with that amendment.

Mr. Hall had a problem with the amendment because it would reward claimants who did not show up to the Court when the Court sets a hearing. He felt that it was important that the Court have the ability to adjudicate the water right with the information it has if the claimant did not show up.

CHAIRMAN WHEAT asked Mr. Hall if he would feel more comfortable leaving the issue remark on the claim.

Mr. Hall indicated that he would be more comfortable if the Water Court dealt with the issue remark with the information before it and adjudicated the water right. He was concerned that the Court could remove the issue remark without resolving the issue remark.

CHAIRMAN WHEAT proposed that, if there was a claim that the Court had to deal with, there was an issue remark, the owner of the claim did not show up, there were no objections, and the Attorney General did not intervene, would Mr. Hall feel that it was DNRC's responsibility to make sure that the issue remark was resolved.

Mr. Hall felt that it was up to the Water Court to resolve the issue remark. He submitted that the Water Court would have the authority to deal with the issue remark per previous court rulings.

{Tape: 3; Side: A; Approx. Time Counter: 11.2 - 15.6}

CHAIRMAN WHEAT asked Mr. Hall if he thought that it put the Court in a tenuous position to have to deal with the issue of not having any objectors and no adversaries.

Mr. Hall did not think that the Court liked the process but he reiterated that they had ruled that it had the authority to carry out the process and that it was workable.

CHAIRMAN WHEAT followed up by asking why the Court shouldn't have the authority to remove the issue remark based on the information provided.

Mr. Hall thought that it did if it resolved the issue remark. The difference he saw was whether the Court could remove the issue remark or if it should have an underlying decision or opinion that would resolve the issue, adjudicate the claim, and then remove the issue remark.

{Tape: 3; Side: A; Approx. Time Counter: 15.6 - 16.7}

CHAIRMAN WHEAT asked Judge Loble what the current procedure was when dealing with issue remarks when there were no objectors of any kind.

Judge Loble replied that it would depend on what the issue remark was. He informed the Committee that there were some issue remarks that have a decree exceeded, which means that there was a district court decree in the past which is being claimed by several people now. He explained that on those particular claims they would call the claim in and have all of the water users come in. He noted that frequently they used the DNRC staff to examine the district court files and come up with a proposal. He asserted that if there were no objectors they would not pursue the claim if there are issue remarks on it. He claimed that they tried to focus their efforts on adjudicating objections and not issue remarks. He mentioned that when HB 407 came to the legislature in 1999 there was hostility about the Water Court adjudicating issue remarks and being perceived to be a prosecutor to water users.

{Tape: 3; Side: A; Approx. Time Counter: 16.7 - 19.4}

CHAIRMAN WHEAT asked if Judge Loble had looked at HB 782 and the proposed amendments. He wanted to know if he supported the amendments.

Judge Loble affirmed that he had looked at the bill and the amendments. He remarked that he would support the amendments because he thought that they made the bill better.

CHAIRMAN WHEAT followed up asking if he would support the bill with the amendments or if he felt that the bill was unnecessary.

Judge Loble replied that he would support the bill, although reluctantly.

CHAIRMAN WHEAT commented that he was hearing conflicting information and he wanted to know how the Judge felt because he was in the driving seat.

Judge Loble responded that the bill was similar to what he proposed to the Montana Supreme Court. He supported the rules to the Supreme Court and would support the bill with Mr. Bloomquist's amendments. However, he wanted the Committee to understand that the bill would not be universally accepted by the water users throughout the state. He thought that the Water Court had to be sensitive to people's property rights.

{Tape: 3; Side: A; Approx. Time Counter: 19.4 - 21.9}

SEN. MCGEE referenced Amendment 5. He suggested that they change the term "'remove' the issue remarks" to "'make a ruling on' the issue remarks." He thought that this might mean that the Court in its ruling would in fact address the issue remark and, in effect, dispose of the issue remark in one form or another.

Mr. Bloomquist answered that the proposed language in Lines 1 and 2 allowed the Court to make a ruling. He thought that Subsections A-C and his proposed D are the options for the Court in making its ruling. He was suggesting as one of the options that the Court could remove the issue remark. He would not be opposed to **SEN. MCGEE'S** suggestion, although he thought that it was implicit in the language.

SEN. MCGEE commented that "rule on the issue remarks" would be appropriate language when dealing with the issue remark rather than "remove" because the issue remark is still there it is just resolved.

Mr. Bloomquist reiterated that he would not have a problem with the wording. It was his intent that the Court be able to resolve the issue remark.

{Tape: 3; Side: A; Approx. Time Counter: 21.9 - 25.7}

SEN. MCGEE asked if "remove" was a problem and if it was removed would Mr. Hall feel better about the bill.

Mr. Hall expressed that he agreed with the change and would support it.

{Tape: 3; Side: A; Approx. Time Counter: 25.7 - 26.3}

SEN. SHOCKLEY inquired about how the Court would handle an issue remark that dealt with a federal agency.

Mr. Lane explained that if HB 782 were to pass with the amendments they would handle the claim the same as for anyone

else. He thought that the federal agencies claim would be treated as any other claim.

SEN. SHOCKLEY did not realize that the Water Court was adjudicating federal reserved water rights.

Mr. Lane thought that **SEN. SHOCKLEY'S** question was referring to claims such as those by Bureau of Land Management or the Forest Service for various uses. He was not talking about the Indian claims but he asserted that they would also be subject to the adjudication and the jurisdiction of the Court if the Indian claimants are unable to reach a compact with Montana resolving their reserved water rights.

{Tape: 3; Side: B; Approx. Time Counter: 0 - 1.1}

SEN. SHOCKLEY wondered if the reserved water rights were issue remarks.

Mr. Lane replied that he doubted it but was unsure. He deferred the question to DNRC.

SEN. SHOCKLEY restated his question to Judge Loble.

Judge Loble replied that the reserved water rights of the Federal Fish and Game and the Bureau of Indian Affairs were all being addressed in the adjudication. He explained that the Reserved Water Rights Compact Commission was trying to reach an agreement with the Tribes and the federal government. When they have a compact, the compact goes to the Water Court. He asserted that there were state-based water rights that the federal government was claiming and there were issue remarks on these water rights. He claimed that they would deal with those the same as everyone else's.

{Tape: 3; Side: B; Approx. Time Counter: 1.1 - 2.1}

SEN. SHOCKLEY assumed that until the Water Rights Compact Commission could come up with a compact the Water Court could not close the basins because the reserved water rights issue would still be there.

Judge Loble explained that the reserved water rights were not defined yet, but that the Compact Commission had until 2009 to achieve compacts with the Tribes and the federal government. He informed the Committee that the State has the adjudication of federal reserved water rights.

{Tape: 3; Side: B; Approx. Time Counter: 2.1 - 3.7}

SEN. AUBYN CURTISS, SD 1, FORTINE, wanted to know what the bill did specifically to expedite the process that HB 22 would not do.

Ms. Franz replied that the primary thing that HB 782 did was establish the process for dealing with the issue remarks. She indicated that the area in which she hoped the bill would expedite the process was by requiring individuals to come in and attempt to deal with the issue remarks with the Department before they go to the Court.

SEN. CURTISS mentioned that some of the opponents had talked about the fact that this bill would be a step back. She asked Ms. Franz to address those comments.

Ms. Franz responded that there had been controversy about issue remarks. She expressed that issue remarks were the type of thing that, as a claimant, an individual would want DNRC and the Water Court to address their neighbors issue remarks but would prefer that theirs are left alone. She thought that there was accuracy in the statement that some issue remarks are very significant and some are not. She thought that it was good that the bill gave the Court discretion to rule upon issue remarks.

{Tape: 3; Side: B; Approx. Time Counter: 3.7 - 7}

SEN. CURTISS stated that it appeared that this bill would inhibit the ability of senior water claimants to protect their water right. She expressed that the major intent of those who carried the bill forward was to protect the rights of the original water rights owners. She felt that the bill would inhibit the ability of a claimant to protect that right should the issue be raised by a state agency.

Judge Loble discussed SB 76. He noted that the legislature anticipated that the water users knew enough about their water rights that they would file claims that were accurate and proper. What has been seen over the years is that not everyone understood their water rights as well as they thought. This has lead to problems with the water rights. He expressed that from 1976 on, there has been a gradual increase of interventions by state agencies and government to make sure that the water rights are historically accurate. He thought that the effort has been successful.

{Tape: 3; Side: B; Approx. Time Counter: 7 - 10.6}

SEN. CURTISS followed up by noting that someone had asserted that this particular bill presumed people guilty unless proven innocent. She asked the Judge to address that assumption.

Judge Loble replied that there was some of that in the bill because the claims were prima facia proof of their content. He explained that the issue remarks would require the water user to give some thought of bringing forward additional evidence to prove that the issue remarks are wrong. He would not go so far as to say innocent versus guilty, but he agreed that it would place an additional burden on the water user to come in and present evidence that the issue remarks were wrong.

{Tape: 3; Side: B; Approx. Time Counter: 10.6 - 11.4}

SEN. GERALD PEASE, SD 21, LODGE GRASS, wondered if there was any input from the Tribes during the hearings in the House.

REP. MCNUTT responded that the only input he received was a question regarding how the bill pertained to the compacts and the reservation water issues.

SEN. PEASE asked **REP. MCNUTT** if it was his opinion that the bill would not affect any of the ongoing negotiations of the Tribes.

REP. MCNUTT did not see how the bill would affect the negotiations because it was all being dealt with by the Compact Commission, who was not involved in the bill.

{Tape: 3; Side: B; Approx. Time Counter: 11.4 - 12.9}

Closing by Sponsor:

REP. MCNUTT commented that the issue had become political. He did not object to the amendments but felt that to do nothing was not the answer. He thought that throughout the interim they made a concerted effort not to let water adjudication die. He asked the Committee to take the bill seriously, even though it may not be perfect. He indicated that they had heard both sides of the issue. He asked the Committee to concur in the bill with the amendments.

{Tape: 3; Side: B; Approx. Time Counter: 12.9 - 15.5}

CHAIRMAN WHEAT closed the hearing on HB 782. He gave Mr. Hall and Mr. Bloomquist the opportunity to discuss the amendments before Executive Action was taken on them.

Executive Action on HB 22

Motion/Vote: SEN. MCGEE moved that HB 22 BE CONCURRED IN. Motion carried 11-1 by voice vote with SEN. SHOCKLEY voting no with SEN. LASLOVICH and SEN. MANGAN voting aye by proxy.

CHAIRMAN WHEAT offered to carry HB 22 on the floor and HB 782 if it passed.

{Tape: 3; Side: B; Approx. Time Counter: 15.5 - 18.7}

ADJOURNMENT

Adjournment: 11:27 A.M.

SEN. MIKE WHEAT, Chairman

MARI PREWETT, Secretary

BRITT NELSON, Transcriber

MW/mp/bn

Additional Exhibits:

EXHIBIT ([jus99aad0.PDF](#))